

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:08-cr-00330-T-30TBM

JOHN ROBERT MILLER

_____/

**MOTION FOR DISCLOSURE OF PORTIONS OF DEFENDANT'S PRE-SENTENCE
REPORT TO BORROWERS AND INCORPORATED MEMORANDUM OF LAW**

The Coast Bank of Florida borrowers listed on the attached Exhibit "A" (hereinafter "borrowers") move this Court, pursuant to Title 18, United States Code, Section 3371, for an order entitling borrowers to a copy of defendant's pre-sentence report and state:

1. Borrowers have filed a motion for a determination that borrowers are "crime victims" as that term is defined in 18 U.S.C. §3771, otherwise known as the "Crime Victims' Rights Act" (hereinafter "CVRA") (Dkt. #16).
2. Borrowers are entitled to disclosure of portions of defendant's pre-sentence report ("PSA"), pursuant to 18 U.S.C. §3771.
3. The relevant portions of defendant's PSR which should be disclosed to borrowers include information specifying the identity of the "victims" of defendant's crimes, any references to Coast Bank borrowers and the calculation of restitution monies which are to be awarded to such victims.
4. Disclosure of the above-stated relevant portions of defendant's PSR will not be prejudicial to defendant's privacy rights.

MEMORANDUM

“The principal function of the presentence report is to assist the court in determining the appropriate sentence.” United States v. Charmer Industries, 711 F.2d 1164, 1170 (2nd Cir. 1983). “Secondarily, the report . . . may serve as a source of information for research.” Id. The permitted use of a PSR is governed by Fed. R. Crim. P. 32(c), which provides as follows:

- (1) The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty . . .

A pertinent issue under the CVRA is whether a third-party victim who seeks disclosure of a defendant’s PSR should be entitled to access to such a report. Fed. R. Crim. P. 32 does not specifically state whether a PSR should be disclosed to third parties, and in recent years, federal courts have addressed the issue. A central element in the showing required of a third person seeking disclosure is the degree to which the information in the PSR cannot be obtained from other sources. Id. at 1177.

Courts have permitted disclosure of PSRs to those defined as “victims” under the CVRA. For example, in United States v. Schlette, 842 F.2d 1574 (9th Cir. 1988), the court permitted full disclosure of a PSR to a victim who sought information prior to initiating a civil suit. The court required that in order to allow disclosure to a third party, the third party “must make some threshold showing that disclosure will serve the ends of justice.” Id. at 1581.

In the present case, the borrowers have the burden of proving to this Court that they are “victims” of defendant’s crimes under the CVRA. The PSR should contain a segment identifying the victims of defendant’s crimes and recommending a plan for restitution.

Since that segment of the PSR is likely to contain information pertinent to borrowers' efforts to be recognized as victims, that segment of the PSR should be made available to borrowers as soon as the PSR is completed. Although the Ninth Circuit Court of Appeals has held that there is no general right under the CVRA for a victim to obtain full disclosure of a PSR, the court left the door open for the release to victims of pertinent portions of the report. In re Kenna, 453 F.3d 1136 (9th Cir. 2006).

In the instant case, borrowers do not seek a disclosure of a full copy of the PSR, as was allowed in Schlette, but merely seek the portions which are relevant to what entities or which individuals are recognized as victims under the CVRA, as the court was willing to do in Kenna. Specifically, the borrowers seek disclosure of any information in defendant's PSR which specifies the identity of the "victims" of defendant's crimes, references Coast Bank borrowers, and contains a calculation of restitution monies which are to be awarded to such victims.

Following the court's reasoning in Charmer, borrowers can demonstrate that the information in defendant's PSR "cannot be obtained from other sources." For example, the information that borrowers seek regarding the identity of the victims is not contained in the Plea Agreement. Such information may only be located in the defendant's PSR. Additionally, borrowers seek information which supports the government's position as to why Coast Bank is an alleged victim and why the borrowers are allegedly not.

In this instant case, disclosure of portions of defendant's PSR is necessary to meet the ends of justice. Borrowers are entitled to understand the nature of defendant's relationship with Coast Bank and other potential victims. Furthermore, often the information in the PSR is essential for making a proper restitution calculation. The borrowers in this

case encompass over 100 individuals who claim a share in any restitution monies awarded to defendant's victims. Borrowers have a compelling need for information contained in the PSR regarding both the identity of the victims and the restitution plan so that they can address any discrepancies with the Court before the restitution award is made.

The burden on the government, court, or probation officer to disclose relevant portions of defendant's PSR would be minimal compared to borrowers' great need for such information. Additionally, the disclosure of portions of defendant's PSR containing information on identity of victims or restitution amounts would not violate defendant's right to privacy or protecting confidential information.

CONCLUSION

For the foregoing reasons, borrowers respectfully request that this Court enter an order pursuant to 18 U.S.C. §3771 directing the probation officer preparing the PSR to, upon completion, supply borrowers through their undersigned counsel with those portions of the report which specify the identity of the "victims" of defendant's crimes, reference Coast Bank borrowers, and contain a calculation of restitution monies which are to be awarded to such victims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing on this 13th day of November, 2008, with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to Rachelle DesVaux Bedke, Assistant United States Attorney (rachelle.bedke@usdoj.gov); and Eduardo A. Suarez, Esq. (esuarez@suarezlawfirm.com), counsel for defendant, and a true and correct copy of the foregoing was furnished via

regular U.S. Mail to David Tremmel, Federal Probation Officer, Post Office Box 3905,
Tampa, FL 33601.

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